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No. 81-2301

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THEODORE BRENNER, d/b/a
Teddy Brenner Enterprises,

Petitioner,

—v.—

WORLD BOXING COUNCIL and
JOSE SULAIMAN CHAGNON,

Respondents.

REPLY BRIEF IN SUPPORT OF A WRIT OF CERTIORARI

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In their Brief in Opposition to the Petition, Respondents contest the existence of the conspiracy among Sulaiman, King and the WBC for the purpose of disassociating themselves from King's invocation of his Fifth Amendment privilege and from King's involvement in the "grand jury investigation involving some of the identical claims raised by [Petitioner] Brenner . . . ." Pet. at 1770.* However, there is overwhelming proof that there was a conspiracy among Sulaiman, King and the WBC to utilize the WBC's power to prevent Brenner from competing with King. Indeed, the undisputed facts reported in the Opinion of

* All references in this Reply Brief to the Petition for a Writ of Certiorari are to the Opinion of the Court of Appeals reproduced in Appendix A of the Petition.

the Court of Appeals establish every element of this conspiracy. Thus, it is undisputed that:

(1) Brenner had valid and enforceable contracts to promote a championship bout between Arguello and Escalera (Pet. at 1758) as well as a contract granting him the exclusive promotional rights to Arguello's services as a boxer (Pet. at 1758);

(2) King falsely asserted non-existent contract rights to the services of Arguello and Escalera* (Pet. at 1758-60);

(3) Sulaiman and the WBC were all aware of the falsity of King's claims** (Pet. at 1760, 1767);

(4) Sulaiman and the WBC supported King's campaign of fraud and interference by compelling Brenner to make concessions to King as a condition to obtaining WBC certification of the Arguello-Escalera bout as a WBC championship bout (Pet. at 1759-60);

(5) King expanded his demands beyond the concessions negotiated on his behalf by Sulaiman (Pet. at 1761, 1768), and demanded that Brenner relinquish all of his contract rights to King (Pet. at 1761);

(6) When Brenner refused to meet King's demand, Sulaiman suspended Brenner as a promoter of championship boxing contests certified by the WBC (Pet. at 1762);

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* With respect to King, the district court observed:

> "[H]e's not a nice fellow, of low moral character, and the people who deal with him, like Madison Square Garden, feel he breaches their agreements with them. In this case it's been shown he takes contracts signed in blank and fills them in and pre-dates them." Tr. 787-7-8.

** The Arguello and Escalera "contracts" sponsored by King (PX 32, 32A) were invalid on their face. Tr. 853, 1128, 1131. *See also* Tr. 448-24-26, 448-76-77, 570-572. Sulaiman admitted that he knew in December 1978 "that Mr. King had submitted *invalid* contracts for an Arguello-Escalera match to the World Boxing Council." Tr. 1131 (emphasis added).

(7) Sulaiman and King had a close relationship (PX 52, 250, 234, 238, 239, 288; *see* Tr. 448-33-35, 503, 533) and were in contact with one another immediately prior to Brenner's suspension (Pet. at 1761);

(8) At the time of the suspension, Sulaiman was fully aware of the extent to which King was overreaching (compare PX 73 and 86 with PX 80; PX 99);*

(9) After suspending Brenner, Sulaiman *ordered* Arguello to fight under the promotional auspices of King (PX 123; Tr. 169-71, 180, 448-58-60, 448-63-66), thereby enabling King to appropriate all of the benefits of Brenner's contract with Arguello (Pet. at 1766); and

(10) Sulaiman and King engaged in large cash transactions other than in the ordinary course of the WBC's business (Pet. at 1762. *See also* PX 234, 238, 239; Tr. 645-650, 965-966).**

The essential theme of respondents' presentation is that Sulaiman was constrained to suspend Brenner because Brenner failed to honor his commitment to Sulaiman to pay King $25,000; that Sulaiman did not know Brenner's version of his dealings with King; and that Brenner was disciplined because he failed to present any explanation to the

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* Trial Exhibits PX 73, PX 80, PX 86, and PX 99 are reproduced in Appendix A to this Brief. This correspondence documents Brenner's compromise with King (PX 73, 86); the principal role Sulaiman played in negotiating the compromise (PX 73, 80, 86, 99); King's repudiation of the compromise (PX 80); and most importantly, Sulaiman's complete knowledge of the rectitude of Brenner's position (PX 86).

** The financial transactions between Sulaiman and his alleged co-conspirator support an inference of conspiracy. *Cf. Beech Cinema, Inc.* v. *Twentieth Century-Fox Film Corp.*, 622 F.2d 1106, 1109 (2d Cir. 1980).

WBC for withholding the $25,000 payment to King.* In the morality play constructed by respondents, Brenner was properly punished for his "breaches of commitments to the WBC" (Br. at 2), and his arrogance in refusing to explain his position to Sulaiman.

This view of events presupposes (as Sulaiman claims) that Sulaiman never received Trial Exhibit 86 in which Brenner explained his position at great length. But there is irrefutable proof that Sulaiman *did* receive this letter. Indeed, on February 13, Sulaiman addressed a letter to Brenner that acknowledged receipt of the letter and referenced a conversation with Brenner about its contents. PX 99.

In short, there was a conspiracy that included Sulaiman and King and the Fifth Amendment issue posed by Petitioner is most certainly presented by the record in this case.

With respect to the issues raised by co-conspirator King's pretrial invocation of the Fifth Amendment, respondents assert that Petitioner must establish a basis in agency law for the attribution to respondents of King's testimony. Br. at 6-8. Petitioner does not contend otherwise. The basis for vicarious attribution on which Petitioner relies is the agency relationship created by the conspiracy. *Lutwak* v. *United States*, 344 U.S. 604, 617 (1953); *Clune* v. *United States*, 159 U.S. 590, 593 (1895). Since King's testimony (or the inferences properly drawn from his invocation of the Fifth Amendment) was admissible against the respondents, it was reversible error for the district court to deny Brenner's request to charge the jury that it could

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* Petitioner contends that the Sherman Act precludes a self-appointed regulatory group which controls access to an economic market from conditioning one competitor's access to the market upon concessions to another competitor.

draw an adverse inference against the respondents from King's invocation of the Fifth Amendment.

If the law were otherwise, the already well recognized difficulties of establishing a civil antitrust conspiracy claim would be rendered insurmountable. Moreover, unless such inferences are permitted, antitrust plaintiffs would be constrained to join as defendants parties who would otherwise not be sued. See Kaminsky, *Preventing Unfair Use of the Privilege Against Incrimination in Private Civil Litigation: A Critical Analysis*, 39 Brooklyn L. Rev. 121, 152-53 (1972). It is respectfully submitted that contrary to the view apparently held by the lower courts, unnecessary proliferation of litigation does not promote the interests of justice and non-party conspirators should not be allowed to use the Fifth Amendment as a sword to protect co-conspirators. *Cf. United States* v. *Hilton Hotels Corporation*, 467 F.2d 1000, 1005-1006 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

Finally, under the antitrust laws, the only permissible functions of the WBC relevant to this case are to award the title of WBC champion to professional boxers in various weight divisions and to rate contenders for WBC championships.*

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* The trial record documents how this fundamental power has been perverted by Sulaiman and the WBC to anticompetitive purposes. Basically, the economics of broadcasting limit televised boxing matches to championship contests. Thus, by controlling access to television, the principal source of revenue in boxing, the WBC is positioned to extort "sanction" fees from promoters that bear no relationship to any service rendered by the WBC. The WBC's power over the domestic boxing industry is sufficiently alarming to have attracted congressional attention in hearings before the Subcommittee on Labor Standards of the House Committee on Education and Labor in 1979 in connection with proposed legislation to establish a Federal boxing board. Hearings on the creation of a Federal Boxing Board, H.R. 2726, 99th Cong., 1st Sess., April 1979.

Petitioner has never contested the appropriateness of the WBC's power to designate contenders for WBC championships and the order in which the contenders are privileged to compete for WBC titles. However, once the WBC determined that Arguello and Escalera were suitable opponents for a championship bout, the WBC could not, consistent with the antitrust laws, condition Brenner's promotion of that fight upon commercial concessions to King. *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 458 (1945). *Cf. United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 33-34 (1960).

In sum, the theory of this case does not search the frontiers of the antitrust laws; the predatory and atavistic acts complained of are precisely the kind of evil that Section 1 was designed to eradicate.

Conclusion

For all the foregoing reasons, Petitioner respectfully submits that the errors identified in the Opinion below warrant correction by this Court and the issuance of a Writ of Certiorari to the Second Circuit.

Respectfully submitted,

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July 30, 1982

APPENDIX

PX EXHIBIT 73 IN EVIDENCE

MARATHON ENTERTAINMENT

January 22, 1979

Mr. Jose Sulaiman
Consejo Mundial De Boxeo
(World Boxing Council)
Apartado Postal 75-254
Mexico 14, D.F.
Mexico

Dear Jose:

Enclosed find letter and check that was delivered to Don King's office Tuesday morning, January 23, 1979.

Thank you.

Very truly yours,

/s/ TEDDY BRENNER
Teddy Brenner

TB/Pg
Enc.

Exhibit 73

MARATHON ENTERTAINMENT
110 East 59th St., New York, N.Y. 10022 (212) 753-3860

ALAN LUBELL *President*

January 22, 1979

Mr. Don King
Don King Productions
32 East 69th Street
New York, N.Y. 10022

Dear Don:

This letter will summarize our understandings with respect to the compromise of the claims you have asserted to the services of the participants in the Alexis Arguello/Alfredo Escalero World Boxing Council Championship Bout presently scheduled to be held on February 4, 1979. It is understood that in return for payment by me to you of $25,000.00, as represented by the enclosed check dated February 5, 1979, you will relinquish any claim to this bout.

We have further agreed that the enclosed check may only be cashed on and after February 5, 1979, and then only if the Arguello/Escalera bout scheduled for February 4, 1979 is actually conducted as a Championship Bout sanctioned by the World Boxing Council.

Very truly yours,

/s/ ALLAN LUBELL
Allan Lubell

AL/pg
Enc.

Accepted and Agreed to by:

.....

January , 1979

PX EXHIBIT 80 IN EVIDENCE

January 30, 1979

Mr. Jose Sulaiman, President
World Boxing Council
Apartado 75-254
Mexico City 14, DF
MEXICO

Dear Mr. Sulaiman:

I want to confirm the determination of and resolution by the World Boxing Council of certain disputes relating to the promotion of upcoming prizefights for the W.B.C. super feather-weight championship and the commitment of the parties involved to be governed and bound by that determination and resolution.

There were three commitments regarding the title in question: i) an Arguello/Chacon bout to be promoted by Don King Productions, Inc.; ii) an Arguello/Escalera bout to be promoted by Teddy Brenner (to which we objected because, *inter alia*, of a contract between us and Mr. Escalera); and iii) a W.B.C. ordered defense by Mr. Arguello against Radfael Limon.

The W.B.C., pursuant to its authority and in accordance with its rules and regulations, determined that the following be the order and procedure regarding super feather-weight championship defenses:

1. the Arguello/Escalera bout shall proceed first and be promoted by Teddy Brenner. An economic settlement has been reached between Mr. Brenner and us so that he shall be the sole promoter of the Arguello/Escalera bout subject to his payment to us of an agreed upon sum. Mr. Brenner has delivered a post-dated check to us for the

Exhibit 80

agreed upon sum with a letter indicating it will be good immediately following the subject bout;

2. the winner of the Arguello/Escalera bout shall next meet Radfael Limon in a mandatory title defense. As you know, we have already reached agreement for that defense with Mr. Limon. And, for your information, Mr. Brenner has agreed with us that if he has any promotional rights to or relating to the services of said winner, he has and will waive them and will not otherwise interfere with our promotion of said defense in consideration of our forbearing any objection to his promoting an Arguello/Escalera bout first;

3. the winner of the bout described in paragraph 2 above shall, as his next title defense, meet Bobby Chacon in a title bout to be promoted by Don King Productions, Inc. As noted in paragraph 2 above and for the same consideration, Mr. Brenner has agreed that if he has any promotional rights to or relating to the services of said winner he has and will waive them and will not otherwise interfere with our promotion of said defense.

Please advise us immediately if the foregoing is not accurate in every regard. In addition, we are sending Mr. Brenner a copy of this letter with the same request.

Sincerely,

DON KING PRODUCTIONS, INC.

By: CONSTANCE HARPER

cc: Mr. Teddy Brenner (By Hand)
ABC Sports, Inc. (By Hand)
John A. Guzzetta, Esq. (By Hand)

PX EXHIBIT 86 IN EVIDENCE

MARATHON ENTERTAINMENT
110 East 55th Street
New York, New York 10022
212-753-3860

February 2, 1979

Mr. Don King
Chairman and Chief Executive Officer
Don King Productions, Inc.
32 East 69th Street
New York, N.Y. 10021

Dear Mr. King:

We have your letter of January 30, 1979. So that there is no further misunderstanding, we wish to simply state that it does not reflect the understanding that we have reached concerning the Arguello/Escalera bout, which is scheduled for February 4, 1979. The only understanding which we reached is set forth in full in the attached letter to you dated January 22, 1979, copies of which have been furnished to Mr. Sulaiman and ABC Sports.

We do not acknowledge any claims you may have to the promotional rights to the services of either Arguello or Escalera and we consider ourselves free to arrange bouts involving these fighters in which Limon and/or Chacon may be participants.

We expressly reject your assertion that we have by words, or conduct, acquiesced in any arrangement which grants you the right to promote any further bouts involving Arguello or Escalera. You are now attempting, at this late date, to impose additional conditions on the agreement which we reached on January 22, 1979.

Exhibit 86

While we are ready, willing and able to perform our obligation under the January 22, 1979 agreement, we will not permit ourselves to be disadvantaged by your overreaching. We have, therefore, instructed our bank not to honor the check dated February 5, 1979, which was tendered to you in full satisfaction of all disputes between us concerning the promotional rights to the services of Messrs. Arguello and Escalera. We trust that you understand our position.

Upon our return, we are prepared to meet with you, at a time and place convenient to you, to make a good faith attempt to resolve our differences in this matter. We wish to stress that we remain ready, willing and able to honor all of the undertakings which we made in our January 22, 1979 agreement, provided that you are willing to adhere to the terms of that agreement.

Sincerely yours,

TEDDY BRENNER

TB/pg
cc: Mr. Jose Sulaiman, World Boxing Council
ABC, Sports
Bcc: Bob Arum, Top Rank

PX EXHIBIT 99 IN EVIDENCE

JOSE SULAIMAN
President

February 13, 1979

Mr. TEDDY BRENNER
110 East 59th Street
New York, N.Y. 10022
U. S. A.

Ref: JS-1755

Dear Teddy:

I am referring to your telephone call and your letter of February 2.

The W.B.C. with the exclusive wish to help, you, accepted the voluntary defense of Arguello against Escalera for your promotion.

However, in order to do so, we were very clear that the winner of that fight must make a mandatory defense against Limon for the promoter who signs both of the fighters or otherwise if not, for he who wins the purse offer.

There is a contract for a fight against Bobby Chacon signed for promoter Don King. This cannot be put aside and not be respected and so I informed you very clearly.

What the W.B.C. decided in a convention, the final in accordance to our Constitution and Populations to which all promoters promoting W.B.C. world title fights must abide.

Sincerely yours,

JOSE SULAIMAN Ch.
President